Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-870

ALVARO RODRIGUEZ,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In the
SUPREME COURT OF THE UNITED STATES
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No. 78-

ALVARO RODRIGUEZ,

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner petitions for a writ of certiorari for leave to appeal from the judgment of the United States Court of Appeals for the Second Circuit, entered on the 1st day of November, 1978, affirming the judgment of conviction entered on the 28th day of July, 1978 in the United States District Court for the Eastern District (Constantine, J.), sentencing petitioner to a term of four years incarceration and seven years special parole, on his plea of guilty to illegal possession of cocaine, in violation of 21 U.S.C. 841 (a) (1), after denial of his motion to suppress the evidence. The District Court had granted him leave to appeal the denial of the motion to suppress the evidence against him.

OPINIONS AND JUDGMENT BELOW

The judgment of the United States Court of Appeals for the Second Circuit entered November 1st, 1978, affirming the judgment of conviction was without opinion and is reproduced in the appendix on pages 1a-2a. The opinion of the United States District Court for the Eastern District of New York is reproduced in the appendix on pages 3a-4a. None of the judgments or opinion have yet been reported officially.

JURISDICTION

The jurisdiction of this Court is invoked for a petition for a writ of certiorari to review the affirmance of the United States Court of Appeals for the Second Circuit pursuant to 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Does a consent to enter an apartment waive Fourth Amendment rights, where obtained from the occupant by fraudulent representations by Government agents?

2. Does mere rumor learned by Government agents constitute probable cause for trying to gain access to the apartment of a person to conduct a broad general investigation?

3. Should Government agents conduct an available preliminary investigation to determine whether there is probable cause before proceeding en masse to an apartment to conduct a general investigation of the occupants?

4. Is an arrest of an alien, who is legally in this country, for failure to have his alien registration card in his possession as required by 8 U.S.C. 1304 (e) in violation of the Fourth Amendment, where the agents making the arrest failed to make a preliminary investigation to determine his actual immigration status?

5. Is equal protection of law violated by the arrest of a Spanish speaking person for violation of 8 U.S.C. 1304(e) by failing to have an alien registration card on his person, where the Special Agent who asked him for it had no probable cause to believe him to be an illegal alien?

STATUTE INVOLVED

. . . 8 U.S.C. 1304 (e) provides as follows:

> "Every alien, eighteen years of age and over, shall at all times carry with him and have in his possession any certificant of alien registration or alien registration card issued to him pursuant to subsection (d) of this section. Any alien who fails to comply with the provisions of this subsection shall be guilty of a misdemeanor and shall upon conviction for each offense be fined not to exceed $100 or be imprisoned not more than thirty days or both."

STATEMENT OF THE CASE

On the 28th day of March, 1978, Special Agent John W. Featherly of the Drug Enforcement Administration met with an undisclosed, confidential informant who allegedly told him "that Helen Cuevas, employed at the Chemical Bank at 1023 First Avenue, Manhattan, New York, had a boyfriend by the name of Alvaro Rodriguez, a Columbian, who they thought just recently entered the country illegally via Canada. They thought this man was an illegal alien. She also advised that Mr. Rodriguez was out of the country, in Columbia. Miss Cuevas was observed with a large amount of money in her pocketbook at the bank, which she stated was $23,000. When it was inquired as to where the money came from she said it was people

from her boyfriend, Alvaro Rodriguez' business, bringing money to her that she would hold for Mr. Rodriguez until he returned to the country." The confidential informant allegedly also said that "Helen Cuevas and Alvarez Rodriguez were observed utilizing two separate deposit boxes at the Chemical Branch at 1023 First Avenue, and large amounts of money were taken—put into safe deposit boxes and taken out." The informer told Agent Featherly that the basis for his belief that petitioner might possibly be an illegal alien was that "from conversations with Helen Cuevas that Mr. Rodriguez had a problem recently reentering the Country, and when he did reenter the country at this time he came in through Canada."

No explanation was offered why the confidential informant would choose this kind of information for a Special Agent with the Drug Enforcement Administration, since it did not involve any information concerning narcotics or controlled substances.

Agent Featherly promptly contacted Special Agents Martin Ficke and William Kerins of the Immigration & Naturalization Service, who ran a cursory check on the name "Alvaro Rodriguez," but reported that there were many such names in their files and that they could not obtain any information, without an address.

The next day, March 29th, 1978, at about four P.M., Featherly, two other agents of the DEA, Scott and Nowozeniuk and Special Agents Ficke and Kerins of the INS established surveillance on the Chemical Bank branch where Helen Cuevas worked. They observed appellant and a friend, who turned out to be Gilberto Marin, pull up in a Pontiac Firebird. Helen Cuevas got into the car and they drove toward Queens followed by the agents. The three hispanics drove to 41-30 50th Street, in the Woodside section of Queens. They entered the building. Shortly thereafter the agents followed. The directory downstairs revealed apartment "3" to be registered to Helen Cuevas.

Instead of now running a check on petitioner, using the address to which they followed him, to find out his status, the five agents pursued their joint operation and proceeded to the apartment registered to Helen Cuevas. They rang the doorbell, which was answered by Frank Cuevas, the fourteen year old son of Helen. Kerins "stated he was an officer of the United States Immigration Service and that he had information that there were possible illegal aliens in the apartment." According to the agents, Frank Cuevas went for his mother who came to the door. She assured them that she was Puerto Rican and therefore, legally in the country and invited them in. The five agents entered the apartment where they observed the mother of Helen Cuevas, two children and petitioner and Gilberto Marin at the dining room table. Marin and petitioner got up to try to find out what was the purpose of the agents' entry into the apartment.

Without any other cause to believe them to be aliens, other than their Spanish accents, Agent Kerins asked them for alien registration cards. Marin produced one. However, petitioner explained that he left his at a tailor shop and asked for permission to get it. The agents refused to allow him to leave. Marin then went to the tailor shop to try to find it. When Marin failed to return in fifteen minutes, the agents put petitioner under arrest for violation of 8 U.S.C. 1304(e) for failing to have an alien registration card, although it is conceded that he was not free to leave from the moment he told them it was at a tailor shop.

As an incident to the arrest, a personal search of petitioner produced cocaine in his sock. Helen Cuevas then authorized a search of the apartment, which produced additional cocaine. Petitioner conceded that it was his, to protect Helen Cuevas from being arrested. In addition, money was discovered and seized. Helen Cuevas then consented to a search of the safety deposit boxes at the bank.

In addition, Special Agent Featherly obtained a search warrant authorizing a search of the deposit boxes. Additional money found in them was also seized.

Papers were also seized from the apartment, which petitioner shared with Helen Cuevas, which included his passport, that contained a stamp that he was legally in the country. The agents never asked for his passport prior to arresting her. It was subsequently learned that petitioner was legally in the country, registered at the Woodside address, 41-30 50th Street.

As a result of the seizure made as an incident to the arrest of petitioner, he was indicted for illegal possession of cocaine in the United States District Court for the Eastern District of New York. A hearing was held before Hon. Mark A. Constantine, to suppress the cocaine. The motion was denied. Petitioner then entered a plea of guilty and was afforded permission to appeal from the order denying the motion to suppress the evidence. On the 28th day of July, 1978, he was sentenced to a term of four years incarceration and seven years special parole, which was affirmed, without opinion, on the 1st day of November, 1978, by the United States Court of Appeals for the Second Circuit.

ISSUES TO BE REVIEWED BY THIS COURT

I.

THE AGENTS WERE WITHOUT PROBABLE CAUSE TO CONTINUE THEIR IMMIGRATION LAW INVESTIGATION WHEN THEY DELIBERATELY FAILED TO INVESTIGATE WHETHER IT HAD ANY GENUINE BASIS.

The information imparted by the confidential informer was gossip and trivia, nothing more. That Helen Cuevas, a bank employee, was seen with $23,000 in cash that she stated she had received from her boyfriend, as profits from his business, had no genuine significance. Many people possess money, without illegal significance. Moreover, the informer's ungrounded suspicion that petitioner, a Columbian, was an illegal alien, was without any basis and the informer gave Agent Featherly no reason why it should be credited. It is significant that the informer told Featherly nothing about cocaine. It is submitted that the so-called informer was a gossip, who apparently had a general dislike of Latin Americans or a personal grievance with Helen Cuevas or petitioner. The information he gave was worthless.

Featherly testified that his efforts to check with INS concerning the alien status of petitioner, if any, met with frustration because he had no address for petitioner. However, the following day, he and four of his colleagues tailed petitioner, Helen Cuevas and Gilberto Marin. They saw them enter an apartment house. Now they had an address. All they had to do was check petitioner's name and address with the INS records and they would have learned that he was legally in this country, thus ending their investigation and obviating any need to go to the Cuevas

apartment. It cannot be said that they had probable cause to continue an investigation, where the agents deliberately by-passed a preliminary check whether they were justified to continue their mission. Therefore, they had no good faith reason to go to the apartment. As set forth hereinafter, the consent they obtained to enter it was fraudulently induced by representations to Helen Cuevas that a simple investigation would have disclosed to be untrue, to wit that she was harboring an illegal alien.

This Court has held that a search warrant that fails to set forth the basis for crediting information of an informer falls short of Fourth Amendment standards. *Auilar v. Texas,* 378 U.S. 108 (1964). The same reasoning would require the fruits of a search suppressed, where an investigation was continued without probable cause, by reason of the bad faith of Government agents in declining to check the obvious, to wit, whether there was any reasonable basis to continue the investigation. There were no exigent circumstances that militated against a preliminary investigation of petitioner's alien status, now that they had his address, to determine whether there was probable cause to go to the apartment where they found appellant, the results of which would have signalled a halt to their inquiry. *Vale v. Louisiana,* 399 U.S. 30 (1970). Even "a street stop is justifiable . . . only when INS agent has reasonable suspicion based on specific articulable facts that such person is an alien unlawfully in the United States." *Illinois Migrant Counsel v. Pilliod,* 540 F.2d 1062 (7th Circ., 1976). It is less justifiable for agents to seek to invade the privacy of a home, when a telephone call to their office would have told them there was no probable cause for such drastic invasion of privacy. This Court has even frowned upon the stopping of a motor vehicle, where the requirements for probable cause are less stringent, in view of the mobility of such instrumentality, without

"specific articulable facts" constituting probable cause that it contains aliens illegally in the country. *United States v. Brignoni-Ponce,* 422 U.S. 873 (1975). Indeed, by upholding this conviction, the Second Circuit has put its stamp of approval on a policy that can work to dilute the Fourth Amendment rights of a large segment of the population based on rumor and untested surmise, merely because they happen to be Latin Americans.

II.

THE FRAUDULENT REPRESENTATIONS OF THE GOVERNMENT AGENTS RENDERED THE CONSENT OF HELEN CUEVAS TO ENTER HER APARTMENT INVOLUNTARY AND INEFFECTIVE TO WAIVE APPELLANT'S FOURTH AMENDMENT RIGHTS.

The testimony of Agent Featherly at the hearing was clear that he had no probable cause to believe petitioner was in possession of narcotics or that he was illegally in this country. His informer, who was never disclosed, merely told him that petitioner's fiancee, Helen Cuevas, had a sizeable sum of money which she kept in a safety deposit box, a fact that had neutral significance for an agent of the Drug Enforcement Administration. The informer also allegedly told him that he thought that petitioner might be illegally in the country. Featherly and his brother agents with the INS did nothing substantial to check the authenticity of this gossip. All they had to do after following appellant to the Woodside apartment house, was check his name, coupled with that address, and the investigation would have had to halt, since he was registered as an alien, legally in the country.

It is respectfully submitted that the latter commonsense course was not followed because the agents were

looking for some pretense to get into the apartment. Indeed, they could have stopped him in the street to make their inquiry, but deliberately delayed an encounter until he entered the apartment he shared with his fiancee.

It is further submitted that petitioner became a subject for investigation when Agent Featherly learned that he was Columbian, a nationality that has received a bad press by reason of involvement of some of its members in the cocaine importation into this country.

The agents sought to justify their entrance into the apartment, by the consent of Helen Cuevas. However, such consent was procured by the fraudulent representations made by Agent Kerins when he told Helen Cuevas that he had information that illegal aliens were living there. He had no such information. Featherly's informer told Featherly no such thing, merely that it was *possible* that Alvaro Rodriguez was an illegal alien. Kerins correctly presumed that petitioner was living with Helen Cuevas. However, before representing to her that he believed illegal aliens were being sheltered in her apartment, he had a duty to check whether Alvaro Rodriguez, residing at 41-30 50th Street, was or was not legally in the country. Featherly testified that such investigation was not possible without an address for petitioner. After following petitioner home, they had an address. The record is crystal clear that they deliberately did not check petitioner's name with address, since the last thing they wanted to find out was that he was legally in the country and thereby lose their pretense for getting into his apartment.

It must also be stressed that the record herein reveals no need for haste in pressing this investigation. The time consumed by checking petitioner's status, now that they had an address, could not have prejudiced the agents, other than by eliminating any cause for further investigation.

Thus, when Kerins told Helen Cuevas that she was suspected of harboring illegal aliens and thereby, understandably alarming her, his representation was less than a half truth, since Kerins had deliberately refrained from investigating whether the gossip that had come to Featherly had any merit. Indeed, were these people not Latin Americans, they would never have been exposed to the invasion of their privacy that initiated this case. It is submitted that a thread of prejudice against Columbians permeates the activity of the agents in the case at bar.

It is submitted that a consent secured by fraudulent representations by a Government agent, accusing an apartment occupant of harboring agents without any basis for such accusation, is not voluntary and therefore the presence of five agents in the apartment violated petitioner's Fourth Amendment rights. *Bumper v. North Carolina,* 391 U.S. 543 (1968). The Government failed to carry its burden to show that the consent of Helen Cuevas had been knowingly and freely given. *United States v. Boston,* 508 F.2d 1171 (2nd Circ., 1974).

The Government gained entrance into the apartment by making a false representation to Helen Cuevas. A simple check, as the agents later did after gaining entrance into the apartment, would have proven to Kerins that there was no basis for telling Helen Cuevas that she was harboring illegal aliens. It is submitted that a consent to enter an apartment, obtained by fraud and false representations, is without validity and such entry offends the Fourth Amendment.

III.

AN IMMIGRATION AGENT SHOULD NOT BE PERMITTED TO MAKE INQUIRY WHETHER A PERSON IS CARRYING HIS ALIEN REGISTRATION CARD AS REQUIRED BY 8 U.S.C. 1304(e), WITHOUT AWARENESS OF SPECIFIC ARTICULABLE FACTS THAT SUCH PERSON MIGHT BE AN ALIEN ILLEGALLY IN THE COUNTRY.

Once gaining entrance into the apartment through their ruse, Agent Kerins asked Marin and petitioner to show their alien registration cards, which must be carried on the person of an alien at all times, pursuant to 8 U.S.C. 1304(e). Bursting aside whether an alien may be challenged in his own home to produce his, it is submitted that Kerins had no probable cause to ask petitioner and Marin for such documents. He had no reason to believe they were aliens illegally in the country, since he bypassed his opportunity to check this out, when he failed to take advantage of the opportunity to investigate petitioner's status, once he learned an address to which he could be connected.

It would be outrageous to cloak INS agents with the power to demand that any person, whether on the public highway or in his home, produce such card, merely because he speaks with a foreign accent. The vast majority of Latin Americans in this country are citizens, entitled to Constitutional protection of their right to privacy. Another vast number of them, including petitioner, are aliens legally in this country, entitled likewise to freedom from unreasonable Government inquiry. It cannot be that because one is a Latin American, he thereby enjoys second class citizen status and can be challenged by INS agents, without probable cause to believe him to be an illegal

alien. The fact is that petitioner was legally in this country. The second fact is that such information was within the reach of the agents in this case, had they cared to check, once having petitioner's address. "The deliberate use by the Government of an administrative warrant for the purpose of gathering evidence in a criminal case must meet stern resistance by the courts." *Abel v. United States,* 362 U.S. 217 (1960). Indeed, the agents never even asked petitioner how long he was in the country. An alien in the country less than thirty days is not required to obtain and, therefore, carry a green card. 8 U.S.C. 1302. Certainly, an agent should not be permitted to make inquiry concerning an administrative requirement, without some basis for belief that the person falls within the provision. *United States v. Gomez Londono,* 553 F.2d 805 (2nd Circ., 1977).

The specter of INS agents accosting Latin Americans at random, as in the case at bar, is so onerous, that it can hardly be doubted that it offends the Equal protection of Law provisions of the Fourth Amendment. It smells of such nationality prejudice, that this Court should resoundedly condemn it, and slam shut the door on the toehold this case has given such practice.

REASONS WHY THE WRIT SHOULD BE GRANTED

The issues in this appeal are of widespread importance. First, there is the question of consent searches. This Court should use this case to rule upon the validity of a search based upon a consent secured in bad faith, by agents who were guilty of making fraudulent declarations to the occupant of an apartment. Secondly, this case will present a vehicle for this Court to pronounce its disapproval of INS agents infringing upon the Constitutionally protected privacy of Latin Americans because of their appearance. This case has unfortunately opened the door to what can become dangerous abuses, if it is construed as encouragement for official lawlessness. Distilling the ingredients of this case to their primary elements, the investigation undertaken of petitioner and his fiancee would not have occurred were they not Latin Americans, nor would petitioner have been asked for his alien registration card had he not spoken with a Latin accent. Such precedent is dangerous and should be checked by this Court.

CONCLUSION

CERTIORARI SHOULD BE GRANTED TO THIS COURT.

Respectfully submitted,

MELVIN M. LEBETKIN
Attorney for Petitioner

APPENDIX A
ORDER OF THE COURT OF APPEALS

United States Court of Appeals
for the Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the first day of November one thousand nine hundred and seventy-eight.

Present:
HONORABLE IRVING R. KAUFMAN,
Chief Judge.

HONORABLE WILLIAM H. TIMBERS
HONORABLE MURRAY I. GURFEIN,
Circuit Judges,

UNITED STATES OF AMERICA,
Appellee,

v.

ALVARO RODRIGUEZ,
Appellant.

78-1278

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed on the unreported order of the district judge dated June 6, 1978.

s/ Irving R. Kaufman
IRVING R. KAUFMAN, Chief Judge

s/ Wm. H. Timbers
WILLIAM. H. TIMBERS

s/ Murray I. Gurfein
MURRAY I. GURFEIN,
Circuit Judges.

APPENDIX B—DECISION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

ALVARO RODRIGUEZ,

Defendant.

COSTANTINO, D.J.

With respect to the motion to suppress, the court finds that:

(1) INS and DEA agents were justified in conducting an investigation to determine whether Alvaro Rodriguez was an illegal alien and/or a DEA fugitive.

(2) Helen Cuevas invited the agents into her apartment.

(3) Alvaro Rodriguez did not have his green card on his person, and was validly arrested pursuant to 8 U.S.C. §1304.

(4) The cocaine seized from Rodriguez' person was therefore seized pursuant to a search incident to a lawful arrest, and is admissible. *United States v. Robinson,* 414 U.S. 218 (1973); *Gustafson v. Florida,* 414 U.S. 260 (1973).

(5) Defendant voluntarily waived his right to remain silent after having been advised of that right, and the statements thereafter made are admissible.

(6) Helen Cuevas, after being advised of her right not to consent to a full search of her apartment and after indicating that she understood that right, voluntarily waived

that right and did in fact voluntarily consent to such a search.

(7) The cocaine and money found in the bedroom were therefore seized pursuant to a valid consent search and are admissible. *United States v. Matlock,* 415 U.S. 164, 165 (1974).

(8) The items seized from the safe deposit boxes were seized pursuant to a valid search warrant and are therefore admissible. In any event, Helen Cuevas had consented to such a search and had given the agents the keys to the boxes.

(9) The court finds that the INS investigation was not a "pretext" for the DEA investigation, but was a proper independent exercise of INS authority pursuant to 8 U.S.C. §1357.

(10) The motion to suppress is denied in all respects.

s/ Mark A. Costantino
U.S.D.J.